No. 84-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,

Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington Corporation, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

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Pursuant to Rule 36 of the Rules of the Court, amicus National Institute of Municipal Law Officers [NIMLO], for its 1,700 member local governments, respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of appellants City of Renton, *et al.* Appellants have consented to the filing of this brief, but appellees have withheld consent.

The state political subdivisions that are members of *amicus* operate NIMLO through their chief legal officers,

variously called city attorney, county attorney, city or county solicitor, corporation counsel, or director of law. The appellant, City of Renton, Washington, is a member of NIMLO. The accompanying brief is signed by the attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and on behalf of each of their cities.

The local government attorneys who participate in the work of NIMLO are called upon to advise their local governing bodies on proposed adult-use zoning measures similar to that at issue in this case. These attorneys have applied the principles of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and they would be called upon to advise their governing bodies under the standards set forth by the court of appeals below. NIMLO and its member municipalities are greatly concerned that no existing local government adult-use zoning ordinance can survive under the standards of the decision below. Of special concern is the holding that Renton may not rely exclusively on other cities' experiences with the blight caused by over-concentration of adult-uses, but must allow adult-uses to begin to proliferate in Renton before the City can legislate to remedy the resultant blight.

Another aspect of the decision of the court of appeals in this case also concerns municipal attorneys. One of the principal functions of local government attorneys in this area of the law is to advise their councils on the state of the law and its application to the peculiar facts of land use in their municipalities. They expect challenges to many land use ordinances and they advise their councils on the probable outcome of litigation. Where, as here, the threat or actuality of litigation favors a modification of an ordinance, the attorneys so advise their councils. Finally, these attorneys defend the ordinances in court. When a district court has found that a land use ordinance permits

adequate alternative sites for an adult-use, these municipal attorneys expect that finding to receive deference on appeal unless it is clearly erroneous. That expectation plays a large part in the ability of these attorneys to advise their councils whether to retain, modify, or repeal a land use ordinance while a challenge is on appeal.

The court of appeals in this case treated as subject to de novo review the district court's finding that application of City of Renton's adult-use ordinance still left adequate alternative sites for the appellee Theatre's use. Under this rule, municipal attorneys no longer can advise their councils adequately on a course of action pending appeal, because legal issues no longer can be isolated from factual ones in determining the likelihood of affirmance of a district court judgment upholding an adult-use zoning ordinance. Municipal councils and their lawyers will have difficulty complying with the law in this area, when the record on appeal counts for nothing and an appeal is no more than "another roll of the dice" for the litigants.

For these reasons, *amicus* seeks leave to file this brief, in order to assist the Court in its consideration of this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set forth in part in the Motion for Leave to File this brief.

In addition, the inability of municipal attorneys to rely any longer on adequately supported findings by a district court will tempt local governments to repeal any regulation of adult uses that is challenged and appealed. Most challenges to adult-use zoning measures are brought under the provisions of the Civil Rights Act of 1871, 42 U.S.C. § 1983, as was this case. The ready availability of

attorney's fees on appeal, and the inclusion in a fee award of work done in the trial court by a plaintiff who loses there but obtains a reversal on appeal, will force local governments to withdraw their land use measures unless some assurance can be given of a likelihood of successfully defending the measure in litigation. One basis of assurance, respect for adequately supported findings of fact, has been eliminated in all land use cases with First Amendment implications by the decision of the court of appeals below.

Because reversal of the decision below will restore the ability of local governments to balance the interests of their citizens in avoiding the blight accompanying over-concentration of adult uses against the First Amendment-based interest of purveyors of adult entertainment, NIMLO and the individual cities that the undersigned represent as municipal attorneys, respectfully urge this Court to reverse the judgment below.

STATEMENT OF THE CASE

We limit our discussion of the record to those portions of the district court's findings for which reversal by the court of appeals prompts our above-recited concerns.

The district court recited the finding of Renton's ordinance that "[e]xperience in numerous other cities . . . has shown that location of adult entertainment land uses degrades the quality of the areas of the City in which they are located . . . . The skid row . . . effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger effect on the City of Renton than other major cities due to the relative sizes of the cities." Juris. St., at 30a. The court then found that "[t]here was no

evidence adduced to show that the secondary effects of adult land uses would be different or lesser in Renton than in Seattle, Tacoma, or Detroit." Juris. St., at 28a.

The district court also found that, under Renton's adult-use dispersal ordinance, "[p]laintiffs are not virtually excluded from Renton by being confined to 'the most unattractive, inaccessible, and inconvenient' areas" of the City. Juris. St., at 28a.

With respect to the first of the district court's findings, the court of appeals concluded:

> "Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton. The studies done by Detroit on the problems of concentrating adult uses are simply not relevant to the concerns of the Renton ordinance — the proximity of adult theaters to certain other uses."

Juris. St., at 19a.

The court of appeals addressed the second finding as follows:

> "The District Court found that 520 acres in Renton were available [under the ordinance] for adult theater sites. Although we do not quarrel with the conclusion that 520 acres is outside the restricted zone, we do not agree that the land is available."

Juris. St., at 13a.

SUMMARY OF ARGUMENT

The decision of the court of appeals in this case would work an anomaly on the local legislative process. Budget

constraints at all levels of government are, perhaps, most noticed in cutbacks on services at the local level. Yet, the court below would force local taxpayers to adopt an inefficient method of dealing with common governmental problems; local officials either would have to authorize unnecessary expenditures to undertake superfluous impact studies or they could elect to assume the cost of abating an avoidable nuisance that was allowed to flourish. A third alternative – to do nothing – would be unacceptable, as the quality of life in their local jurisdictions would suffer in the same way as has been experienced in other localities facing similar issues.

The City of Renton had adequately studied both the problem and potential solutions for the zoning of adult businesses. In so doing, Renton, like many other local governments,[1] has tried to develop an ordinance that is both effective and in compliance with the constitutional limitations on such regulations. The fact that the district court also found that the City's ordinance made sites available for adult business uses further supplements the legislative record, and the appellate court should not be permitted to disregard the trial court's inquiry and conclusions.

[1] *See*, Brief of Amici Curiae City of Whittier in Support of Juris. St., at 2 n.3; Brief of Amici Curiae National League of Cities in Support of Plenary Hearing, at 10 n.18.

ARGUMENT

I

THE COURT OF APPEALS REJECTED TRADITIONAL METHODS OF LEGISLATIVE FACT–FINDING WHICH HAVE FORMED THE BASIS OF CONSTITUTIONALLY APPROVED LEGISLATION BY THE FEDERAL AS WELL AS LOCAL GOVERNMENTS.

In collecting the empirical studies from Detroit, Seattle and elsewhere, and assessing the validity of the studies to the smaller City of Renton, the City Council of Renton engaged in a type of legislative fact-finding which has long been approved by this Court. That local governing bodies consider ordinances passed by other communities and adapt them to their own unique local circumstances is obvious enough from the record of this case and the opinions in other adult-use zoning cases cited by the court of appeals, Juris. St., at 18a-19a.

Here, Renton's Council considered the experiences of larger cities and concluded that the blighting effect of over-concentration of adult uses would be great in Renton. The district court found that this legislative finding was uncontradicted in the record of the case.

The only thing more Renton could have done – and apparently this is what the court of appeals would have required it to do – was to allow adult theaters to concentrate more densely than the proposed ordinance would permit[2] and then measure the blight over time. There is

[2] It is important to bear in mind that Renton did not prohibit adult uses; it merely required them to be dispersed.

nothing in the First Amendment which requires a government to permit a nuisance to flourish before restricting it. If the balance struck by local regulation is a constitutional balance, one local government may act based on the experiences of others.

If Renton's legislative fact-finding is insufficient, then the constitutionality of other federal[3] as well as state[4] and local[5] legislation, is called into question. It is common for legislatures to assess the impact of an evil in areas other than their own, and to assess the effect various remedies have had on the evil. Moreover, it is common for legislatures to enact a remedial scheme with no empirical studies at all, based solely on the inferences which the scientific or social scientific community makes in predicting causes and effects. All this is rejected by the conclusions of the court of appeals below, and the effect of affirmance of these conclusions by this Court will not be limited to First Amendment cases.

We think this view, a necessary consequence of the holding of the court of appeals in this case, is erroneous, and we urge this Court to reject it, by reversing the judgment below upon which it rests.

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[3] *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (appropriate for Congress to assess various considerations regarding limitation on right to vote; recognizing realities familiar to the legislators).

[4] *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 215 (1983) (issue of economic uncertainties engendered by nuclear waste disposal lends itself to generalized decisionmaking).

[5] *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 54 & n. 6, 55 & n. 8 (1976) (city council finding of undesirability of nuisance concentration generally; no evidence of study of concentration in Detroit specifically).

II

THE COURT OF APPEALS IGNORED THE TRADITIONAL RESPECT APPELLATE COURTS HAVE SHOWN FOR THE ADEQUATELY SUPPORTED FINDINGS OF DISTRICT COURTS.

The court of appeals substituted its view, of whether the 520 acres outside the prohibited perimeter of Renton's dispersal ordinance were "available" for adult uses, for the fully supported findings of the district court.

In so doing, the court of appeals acted contrary to Rule 52 of the Federal Rules of Civil Procedure and repeated decisions of this Court.[6]

In zoning as in other cases, the courts — and this Court — have found that determination of what areas are "available" under an ordinance for a particular use, is a factual issue, not a legal one.[7]

Indeed, the lack of appropriate deference to the district court's findings exacerbates the court of appeals' rejection of Renton's local circumstances. This Court has commented before on the paucity of local legislative histories.[8]

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[6] *E.g., Rogers v. Lodge*, 458 U.S. 613 (1982) (finding of discrimination in maintenance of at-large election system); *Columbus Board of Education v. Penick*, 433 U.S. 449, 468 (1979) (Burger, C.J., concurring) (school systemwide discriminatory intent); *Pullman-Standard v. Swint*, 456 U.S. 273, 286 (1982) (intentional employment discrimination) ("Rule 52 . . . does not make exceptions or purport to exclude certain categories of factual findings . . . .").

[7] *See, Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981); *Young v. American Mini Theatres*, 427 U.S. 50, 71 n. 35 (1976); *Lydo Enterprises, Inc. v. Las Vegas*, 745 F.2d 1211 (9th Cir. 1984); *Alexander v. Minneapolis*, 698 F.2d 936, 938 (8th Cir. 1983).

[8] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72-4 (1981); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 468, 470 (1981) (search for purpose of statute likely to be elusive).

Here, the appellee has made the same complaint. Mot. to Affirm, at 3. But in this case, the district court held an extensive hearing at which city officials, officials of the appellee, and the appellee's attorney, supplemented the legislative record. See Juris. St., at 9. The lack of published local legislative histories makes imperative the kind of factual inquiry which the district court undertook in this case. In this kind of case, preeminently, the courts of appeals should not — and should not be permitted to — violate Fed. R. Civ. P. 52 by substituting their own opinions of the facts for that of the district courts.

CONCLUSION

Had the court of appeals applied Fed. R. Civ. P. 52 properly, it would have affirmed the finding that adequate alternate sites were available for adult uses in Renton within the constraints of the City's dispersal ordinance. Thus the limitation in *Young v. American Mini Theatres* perceived by the court of appeals, see Juris. St., at 13a & n. 11, is not applicable to the record of this case. If the court of appeals had properly considered Renton's traditional legislative fact-finding — and the district court's finding of fact on the similarity of other cities' experience to Renton's circumstances, Juris. St., at 30a — it would have affirmed the district court's conclusion that Renton's dispersal ordinance passed constitutional muster.

Because it did neither, the court of appeals erred, and the judgment should be reversed with instructions to affirm the judgment of the district court upholding the ordinance.

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